SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 50

GENT, ET AL., APPELLANTS,

vs.

ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS

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[fol. 2]

IN THE CHANCERY COURT
OF JEFFERSON COUNTY, ARKANSAS
FIRST DIVISION

No. 35013

STATE OF ARKANSAS, Plaintiff,

vs.

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR MAGAZINES, and JOHN NICKELL and W. E. BURNHAM, JR., Defendants.

COMPLAINT

Comes the State of Arkansas by E. W. Brockman, Jr., Prosecuting Attorney for the Eleventh Judicial District of which Jefferson County, Arkansas, is a part, and for petition states:

That Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace, and Sir Magazines are being distributed and sold in Jefferson County, Arkansas, and there is probable cause to believe that the contents thereof are of an obscene nature as defined by Sec. 41-2715 of the statutes of Arkansas; that all of said magazines contain pictures of women in various conditions of dissarray and there is probable cause to believe that stories and articles therein appeal to a prurient interest.

That a copy of Gent magazine, published by PAR Particulars, Inc., 270 Madison Avenue, New York 18, New York, is hereto attached and marked Exhibit "A" to this petition.

That a copy of Swank magazine, published by Royal Publications, Inc., 26 West 47th Street, New York 36, New York, [fol. 3] is hereto attached and marked Exhibit "B" to this petition.

That a copy of Modern Man magazine, published by Copyright Publishers' Development Corp. 8150 North Central Park Avenue, Skokie, Illinois, is hereto attached and marked Exhibit "C" to this petition.

That a copy of Bachelor magazine, published by Magtab Publishing Corp. 509 Fifth Avenue, New York 17, New York, is hereto attached and marked Exhibit "D" to this petition.

That a copy of Cavalcade Magazine, published by Skye Publishing Co., Inc., 505 Eighth Avenue, New York 18, New York, is hereto attached and marked Exhibit "E" to this petition.

That a copy of Gentleman magazine, published by Bruce-Royal Publishing Corp., Division Street, Derby, Conn., is hereto attached and marked Exhibit "F" to this petition.

That a copy of Ace Magazine, published by Four Star Publications, Inc., 509 Fifth Avenue, New York 17, New York, is hereto attached and marked Exhibit "G" to this petition.

That a copy of Sir magazine, published by Volitant Publishing Corp. 21 West 26th Street, New York 10, New York, is hereto attached and marked Exhibit "H" to this petition.

That from an examination of said exhibits, there is reasonable grounds and probable cause to declare said magazines and contents thereof as obscene.

That the name of the seller of said magazines and his address, is John Nickell, 600 West 23rd, Pine Bluff, Arkansas, and the name and address of the distributer in [fol. 4] Jefferson County, Arkansas, is William E. Burnham, Jr., 1326 South Cherry Street, Pine Bluff, Arkansas.

Wherefore, petitioner prays that the magazines described in the complaint herein be declared obscene; that the respondents be enjoined and restrained from selling, exhibiting or commercially distributing any of said magazines or giving away or offering to give away said magazines, or possessing any of said magazines with the intent to sell or commercially sell or give away or offer to give away any of said magazines and that further, any and all of the above

said magazines now in the custody of the respondents should, under proper orders of this Court, be surrendered, seized and destroyed and for all other general and proper relief.

E. W. Brockman, Jr., Prosecuting Attorney, Eleventh Judicial District.

Duly sworn to by E. W. Brockman, Jr., jurat omitted in printing.

[fol. 5] (Exhibits attached to Complaint withdrawn and introduced at the trial.)

Summons issued on the following:

John Nickell

W. E. Burnham, Jr.

Issued: February 4, 1964

Served: February 5, 1964

[fol. 6]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

ORDER TO SHOW CAUSE—February 5, 1964

Now on this day comes on this cause to be heard, the State of Arkansas appearing by E. W. Brockman, Jr., Prosecuting Attorney for the Eleventh Judicial District of which Jefferson County is a part, and from the petition with the exhibits attached thereto, and from other matters and things before the Court, the Court finds:

That the Court has personally examined and perused the contents of the following described magazines and there is

[File endorsement omitted]

probable cause to believe that the contents of the above described magazines are obscene and that the respondents should be required to show cause why said magazines should not be adjudicated obscene.

It Is Therefore by the Court considered, ordered and adjudged that the respondents, Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, John Nickell and W. E. Burnham, Jr., be, and they are hereby ordered and directed to show cause why said magazines should not be declared obscene, on or before the 9:30 a.m. [fol. 7] 12 day of March, 1964.

The Sheriff of Jefferson County, Arkansas, be, and he is hereby ordered and directed to serve a copy of this order and a copy of the Complaint upon the resident respondents notifying them of the pendency of the petition and the date of the hearing to show cause and that he shall make due return thereof and proof of service thereon showing service for the time and in the manner prescribed by law upon the resident respondents; and a copy of this Order and a copy of the Complaint shall be mailed to the non-resident respondents by certified mail.

Joseph Morrison, Circuit Judge.

This the 5 day of February, 1964.

[fol. 8]

IN THE CHANCERY COURT OF JEFFERSON COUNTY,
FIRST DIVISION

No. 35013

[Title omitted]

SEPARATE ANSWER OF JOHN NICKELL AND W. E. BURNHAM, JR.—Filed February 21, 1964

Come the defendants, John Nickell and W. E. Burnham, Jr., by their attorney, Jay W. Dickey, and for answer to the complaint filed herein, state:

[File endorsement omitted]

They admit that they are distributing and selling magazines bearing the titles of Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir. Said defendants state that because the magazines were sent to them by Second Class Mail, it is to be presumed that the United States Government found said magazines not obscene, and defendants, therefore, felt free to distribute and sell the same.

Said defendants further state that they will gladly and without objection abide by the ruling made by this court in regard to whether or not any or all the above-named magazines are obscene, and will discontinue the distribution and sale of the magazines, if any, which the Court declares to be obscene.

Defendants specifically deny that all magazines bearing the above titles now held by these two defendants should be seized and destroyed, which would result in a monetary [fol. 9] loss to said defendants, and state that they should be allowed to withdraw and return to the publishers all magazines found to be obscene in nature, if in fact, any are found to be obscene.

Wherefore, defendants John Nickell and W. E. Burnham, Jr., pray that this court enter an order directing what action they shall follow in regard to the above magazines, and for all other equitable relief.

Jay W. Dickey, Attorney for John Nickell and W. E. Burnham, Jr.

Duly sworn to by John Nickell, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 12]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

STATE OF ARKANSAS, Plaintiff,

vs.

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, and JOHN NICKELL and W. E. BURNHAM, JR., and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., COPYRIGHT PUBLISHERS' DEVELOPMENT CORP., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO., BRUCE-ROYAL PUBLISHING CORP., FOUR STAR PUBLICATIONS, INC., and VOLITANT PUBLISHING CORP., Defendants.

RESPONSE OF GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, AND PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., COPYRIGHT PUBLISHERS' DEVELOPMENT CORP., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO., BRUCE-ROYAL PUBLISHING CORP., FOUR STAR PUBLICATIONS, INC., AND VOLITANT PUBLISHING CORP.—Filed March 11, 1964

Respondents, Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, and Par Publications, Inc., Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., are magazines and corporations incorporated by laws of states other than the State of Arkansas. Each corporation publishes the [fol. 13] magazine attributed to it in the Complaint. Each denies, on behalf of itself and the magazines it publishes,

[File endorsement omitted]

that there is probable cause to believe the stories and articles therein appeal to a prurient interest; denies that there are reasonable grounds and probable cause to declare each of said magazines and the contents thereof to be obscene.

In further response, each of the respondents named above alleges that Act 261 enacted by the General Assembly of the State of Arkansas in 1961 is void for the following reasons:

(a) The said Act is violative of the First and Fourteenth Amendments to the Constitution of the United States, in that it abridges freedom of speech and of the press, and deprives respondents of their property without due process of law.

(b) The said Act is violative of Article II, Section 6, of the Constitution of the State of Arkansas in that it deprives respondents of liberty of the press and a free communication of thoughts and opinions, and is violative of Article II, Section 8, in that it deprives respondents of their property without due process of law.

(c) The said Act, in its definition of the word "obscene," is too vague to put respondents on notice as to what published material is banned by its provisions, and is violative of the due process clause of the Fourteenth Amendment to the United States Constitution. It establishes as a test for obscenity "contemporary community standards" when the [fol. 14] First and Fourteenth Amendments to the Constitution of the United States require nation-wide standards.

(d) It authorizes the banning of publications on the basis of containing matter other than "hard core pornography," as that phrase is used in the interpretation of the First and Fourteenth Amendments to the Constitution of the United States by the Supreme Court of the United States.

The action of this Court in forcing respondents to trial on the return date of the Order to Show Cause is arbitrary and unreasonable and deprives them of a fair opportunity

to present witnesses whose testimony would show that there is no obscenity in said publications when tested against nation-wide standards, which is requisite if published matter is to be banned in a proceeding which is not violative of the First and Fourteenth Amendments to the Constitution of the United States; and of the opportunity to prepare and present other testimony essential to the vindication of their rights, all in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, respondents pray the Court to grant a reasonable time to prepare for a hearing, that on hearing the Complaint filed herein be dismissed, and for all proper relief.

Edwin E. Dunaway, Robert C. Downie, 1610 Tower Building, Little Rock, Arkansas.

[fol. 24]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

AMENDMENT TO COMPLAINT—Filed March 25, 1964

Comes the State of Arkansas, by E. W. Brockman, Jr., Prosecuting Attorney of the Eleventh Judicial District, and for his Amendment to Complaint states:

That in order to specifically mention and set out the pictures, articles and cartoons which are allegedly obscene, petitioner states that the following articles, pictures and cartoons are of a purient (sic) and obscene nature:

Gent Magazine, February, 1964, issue: Pictures at pages 2, 10, 11, 12, 13, 20, 21, 31, 37, 38, 39, 63, 64, 65; Articles at pages 33, 35, 55, 47, 48, 49; calendar at page 30.

[File endorsement omitted]

Swank Magazine, March, 1964, issue: Pictures at pages 2, 4, 25, 26, 27, 28, 34, 35, 36, 37, 38, 39, 40, 54, 55, 56, 57; Articles at pages 7, 11, 29, 48.

Modern Man, February, 1964, issue: Pictures at pages 18, 19, 20, 28, 29, 30, 31, 32, 33, 41, 42; Articles at pages 15, 16, 17.

Bachelor Magazine, March, 1964, issue: Pictures at pages [fol. 25] 2, 8, 15, 16, 17, 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 40, 41, 42, 43, 48, 49, 50, 51, 55, 56, 57, 61, 62, 63, 66, 67; Articles at pages 6-7, 12-15, 21-22, 81, 82, 31, 28-30, 44-46, 58-60, 81.

Cavalcade Magazine, February, 1964, issue: Pictures at pages 2, 12, 13, 14, 22, 23, 24, 25, 37, 38, 48, 49, 52, 53, 54; Articles at pages 6, 7, 59, 8, 9, 33.

Gentleman, April, 1964, issue: Picture on cover and at pages 2, 7, 9, 10, 11, 30, 31, 32, 34, 35, 52, 53, 55, 56, 57, 58; Cartoon at page 15.

Ace Magazine, March, 1964, issue: Pictures at pages 17, 18, 19, 24, 25, 26, 32, 33, 34, 35, 40, 41, 42, 43, 49, 50, 51, 57, 58, 59, 66, 67; Articles at pages 11, 21, 22, 48, 69, 70, 28, 29, 30, 80.

Sir Magazine, March, 1964, issue: Picture on cover and at pages 5, 17, 18, 19, 20, 21, 32, 33, 34, 35, 36, 37, 51, 52; Article at page 10-13; Jokes at page 68; Story at page 50.

That the above pictures, articles and cartoons are all of a lewd, lascivious and obscene nature and calculated to appeal to the purient (sic) interest of readers of these magazines; that this specific information should be considered along with the original pleadings filed herein and information mentioned and set out therein.

Wherefore, petitioner prays that the Court permit this Amendment to Complaint and that the specific information [fol. 26] alleged herein to be obscene be considered along with all of the information and allegations mentioned and set out in the original complaint and upon final hearing, all of the material be declared obscene and that the relief

as prayed in the original complaint be granted and for all other general and proper relief.

E. W. Brockman, Jr.

Duly sworn to by E. W. Brockman, Jr., jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 27]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

No. 35013

[Title omitted]

AMENDMENT TO RESPONSE—Filed April 6, 1964

Come the respondents, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., and for amendment to their Response, state:

They specifically deny that any of the pictures, articles or cartoons mentioned in the Amendment to Complaint are of a prurient or obscene nature or that any are of a lewd, lascivious or obscene nature or that any of them appeal to the prurient interest of readers of the magazines according to community standards.

Wherefore, these respondents readopt the allegations of their original Response and pray that the Complaint as amended be dismissed, and for all other proper relief.

Edwin E. Dunaway, Robert C. Downie, by Edwin E. Dunaway.

[File endorsement omitted]

Duly sworn to by Edwin E. Dunaway, jurat omitted in printing.

[fol. 28] Certificate of Service (omitted in printing).

[fol. 35]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS
FIRST DIVISION

No. 35013

[Title omitted]

RESPONSE OF GENT MAGAZINE AND PAR PUBLICATIONS, INC.—
Filed April 24, 1964

Comes now the Defendant, Gent Magazine, a publication of Par Publications, Inc., by its attorneys, Gregory & Claycomb of Pine Bluff, Arkansas, and for its Response to the Complaint and Amendment to the Complaint of the Plaintiff states and alleges as follows:

The Defendant, Gent Magazine—Par Publications, Inc.—admits that it is a magazine being distributed and sold in Pine Bluff, Jefferson County, Arkansas.

All other allegations of the Complaint and Amendment to the Complaint of the Plaintiff are denied.

The said Defendant specifically denies the allegations of the Plaintiff that there is probable cause to believe that the contents of the Defendant magazine are of an obscene nature or that there is reasonable grounds and probable cause to believe that the stories and articles therein appeal to a prurient interest.

[fol. 36] The said Defendant further specifically denies that the contents of the magazine are of an obscene nature or such as to appeal to a prurient interest or that they are of "lewd, lascivious and obscene nature and calculated to appeal to a prurient interest."

In the alternative, if the said Defendant's magazine should be, under the meaning of the Arkansas statute, found to be an obscene publication, then it is further stated and alleged that:

The said Act 261 enacted by the General Assembly of the State of Arkansas in 1961 in establishing a test for ob-

[File endorsement omitted]

scenity as "contemporary community standards" is in violation of and contrary to the First and Fourteenth Amendments to the Constitution of the United States which requires that the standard for obscenity be a nation-wide standard. The said statute further authorizes the banning of publications on the basis of containing matter other than "hard-core pornography" as that phrase has been used in the interpretation of the First and Fourteenth Amendments to the Constitution of the United States by the Supreme Court of the United States. The said Defendant further denies that under the applicable test for obscenity as enunciated by the United States Supreme Court said Defendant's magazine is obscene.

Wherefore, the Defendant, Gent Magazine—Par Publications, Inc., prays that this Court find that the allegations against the said Defendant are without foundation and there are not reasonable grounds and probable cause for the relief sought by the Plaintiff and that the Defendant's [fol. 37] magazine is not obscene as alleged within the meaning of the State statute, and that said Complaint and Amendment to Complaint as against the said Defendant be dismissed and that said Defendant recover its costs and all other proper relief; or, in the alternative, if said Defendant's publication should be considered to be obscene within the definition of that Act, then the Court find that said statute is unconstitutional insofar as it establishes a standard contrary to the First and Fourteenth Amendments to the United States Constitution, and further find that the said Defendant's publication is not obscene within the constitutional definition of obscenity and that the said Complaint and Amendment to Complaint as against the Defendant be dismissed and that said Defendant recover its costs and all other proper relief.

Gregory & Claycomb, Attorneys for Gent Magazine —Par Publications, Inc., by H. Murray Claycomb.

Duly sworn to by H. Murray Claycomb, jurat omitted in printing.

[fol. 38] Certificate of Service (omitted in printing).

[fol. 216]

IN THE CHANCERY COURT OF JEFFERSON COUNTY, ARKANSAS

CHARGE TO THE JURY

Gentlemen of the Jury:

The Court seeks your assistance in arriving at the decision of the issues in this case, not for the purpose of escaping the responsibility which the law imposes upon a Chancellor to render decrees but because the Court believes that the combined judgment of twelve substantial citizens who have been selected to serve on this jury would be of material assistance in reaching the right determination.

Now the statute under which we are proceeding, reading the parts that are applicable here is as follows:

"Act 261 of the 1961 Legislature. The purpose and intent of the Act. The General Assembly hereby determines that during the past several years the spread of obscene publications has become a matter of increasingly grave concern to the people of this State. The elimination of this evil and the consequent protection of the citizens and residents of the State against those publications are in the best interest of morals and general welfare of the people. Accomplishment of this end can best be achieved by providing Prosecuting Attorneys, both with the speedy civil remedy for obtaining a judicial determination of character and contents of publications and with an effective power to reach non-residents responsible for the composition, publication and distribution of obscene pub-
[fol. 217] lications within the state.

Section III. Definitions. The following words, terms and phrases used in this Act shall for the purpose of this Act have the meanings respectively ascribed to them in this section. I. Mailable matter means (a) printed or written matter or material having a second class mailing privilege under the laws of the United States, or (b) any other printed or written matter or material which has not

been determined to be non-mailable under the laws of the United States.

II. Obscene means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Prurient, as used in this statute means to be inclined or disposed to lewdness or lascivious thoughts, to be lecherous.

"III. A person means any individual, partnership, firm, association, corporation or other legal entities"—Let me interpose here, gentlemen, the definition that I just gave you of prurient is not contained in the Statute, that is, the Court supplied the definition of prurient. I am reading now from the Statute.

"IV. Printed or written matter or material means any book, pamphlet, magazine, periodical, newspaper, picture magazine, comic book, story, paper or other printed or [fol. 218] written matter. It does not include written or printed matter or material used by or in any recognized religious, scientific or educational institution."

Section IV provides criminal penalties under certain conditions, which are not involved in this action. The Chancery Court has no criminal jurisdiction and this is not a criminal proceeding.

"Section V. Mailable matter. Whenever the Prosecuting Attorney for any county has reasonable cause to believe that any person with knowledge of its contents is engaged in sending, causing to be sent, bringing or causing to be brought into the State for sale or commercial distribution, or in this State preparing, selling, exhibiting, commercially distributing or giving away or offering to give away or has in his possession with intent to sell or commercially distribute or exhibit or give away or offer to give away, any obscene mailable matter, the Prosecuting

Attorney for the county in which such mailable matter is sent or caused to be sent, shall institute an action in the Chancery Court in that county for an adjudication of the obscenity of the mailable matter.

Section VI. Action to declare mailable matter obscene. The action authorized by Section V shall be commenced [fol. 219] by the filing of a complaint to which shall be attached a true copy of the allegedly obscene mailable matter. The complaint shall, (a) be directed against the mailable matter by name and description; (b) allege its obscene nature; (c) designate as respondents and list the names and addresses if known of its author, publisher or any person sending or causing it to be sent, bringing or causing it to be brought into this state for sale or commercial distribution. And if any person in this state preparing, selling, exhibiting, commercially distributing or giving away or offering to give away or possessing with the intent to sell, or commercially distribute, or exhibit, or give away or offer to give away; and pray for an adjudication that it is obscene, and pray for a permanent injunction against any person sending or causing it to be sent into this State, pray for its surrender or seizure or destruction."

Now there are other sections in the statute. Do either of counsel think that the other sections ought to be read?

Mr. Dunaway: I don't see any necessity in it.

The Court: I don't believe it will be of any further help.

Now, the court will submit to you certain interrogatories which you will consider. They are numbered one, two and three. Interrogatory No. 1, "Are all the magazines involved in this action obscene?" Obscene as defined by the [fol. 220] statute just read. Your answer to that question will be "Yes" or "NO." If your answer is unanimously "Yes", then you need to consider no further interrogatories. If, however, you find that not all of the magizines are obscene, your answer will be "No" and you will then proceed to consider Interrogatory No. 2, which reads: "If your answer to Interrogatory No. 1 is "Yes" then you will consider no more than Interrogatory No. 1. If your answer

to Interrogatory No. 1 is "No" you will then consider and answer this Interrogatory, to-wit: Are some of the magazines obscene? Answer "Yes" or "No". If your answer to Interrogatory No. 2 be "No" then you will consider no further Interrogatories. If your answer to Interrogatory No. 2 be "Yes" you will designate which of the magazines you find to be obscene" by writing their names, individually.

The Court has been requested to give you certain specific instructions.

Whereupon, the Court gave the following instructions:

COURT'S INSTRUCTION "A"

"The State has not asked for a temporary restraining order or injunction. None of these defendants are charged with violation of any restraining order or injunction."

The Court's Instruction "A" was given without objection.

[fol. 221] PUBLISHER'S REQUESTED INSTRUCTION No. 1

"The statute under which this action was brought defines obscenity in the following language: "Obscene" means that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

Publisher's Requested Instruction No. 1 was given without objections or exceptions.

PUBLISHER'S REQUESTED INSTRUCTION No. 2

"In determining the dominant theme of the material in evidence in this case, you must decide whether, to the average person, applying contemporary community standards, those materials appeal to the prurient interest of the average person."

Whereupon, the Court, overruled and refused to give Publisher's Instruction No, 2, as offered, and on the

Court's own motion amended said instruction and gave it in its amended form, over the general objections and exceptions of the Publishers as follows:

PUBLISHER'S REQUESTED INSTRUCTION No. 2—AMENDED

"In determining the dominant theme of the material in evidence in this case, you must decide, applying contemporary community standards, whether those materials are obscene."

Mr. Dunaway: We object to the modification by the [fol. 222] Court. The law is that it must be the "Average person".

PUBLISHER'S REQUESTED INSTRUCTION No. 3

"The contemporary "community" in terms of whose standards of decency the issue of obscenity must be decided is not Pine Bluff, Arkansas, or Jefferson County, Arkansas, but that "community" is the national community as a whole."

Whereupon, the Plaintiff objected to Publisher's Requested Instructed No. 3, as offered; Plaintiff's specific objection being as follows:

Mr. Brockman: We have some cases Your Honor to show that that is not correct.

Mr. Dunaway: In order to expedite this matter, may I say this. There are some cases holding both ways, the matter of whether the test is a local community or the national community is presently before the U. S. Supreme Court and may I suggest since the Court has already indicated simplifying, go ahead and refuse this and let us note our objections.

The Court: The Court is refusing the instruction as offered for the reason that this procedure is under statutes enacted by the State of Arkansas and the standard could not be extended beyond that.

Mr. Dunaway: Note our objections to the refusal of the Court to give our Instruction No. 3.

[fol. 223] PUBLISHER'S REQUESTED INSTRUCTION No. 4

"The test of obscenity is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or the depraved, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved.

The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact on the average person in the community. The magazines must be judged as a whole in their entire context, and you are not to consider detached or separate portions in reaching a conclusion."

Whereupon, the Plaintiff objected to Publisher's Requested Instruction No. 4, as offered; Plaintiff's specific objection being as follows:

Mr. Bridgeforth: There is one part of that that wasn't taken from it—he read, "The magazines must be judged." The case reads, "The books must be judged." We contend there is a distinct difference in books and magizines. Magazines have stories—and we have authority for that fact—can be obscene in itself—that entire story, not a particular [fol. 224] part of that story but the entire story—if a particular story in a magazine is obscene and if as a whole then the magazine can be found obscene.

Mr. Dunaway: I think that is true. In the instruction which was quoted in the Roth case from which I took this, it does not use the word "magazine". I have used the word magazine here in order not to confuse the jury because magazines are what we are talking about. In the Roth case it says, "Books, pamphlets paper, letter writing, and other publications."

Mr. Bridgeforth: It says books, pictures and circulars to clear the record.

The Court: Mr. Brockman, what is your overall attitude on this Instruction No. 4, that we have been discussing?

Mr. Brockman: Well, Your Honor, we object to it on the ground that magazines are judged in a different light and therefore you would have to rephrase it or draw the instruction in order to apply to magazines.

The Court: I think the way he has drawn it is incorrect; it shouldn't be given.

Mr. Dunaway: And briefly we think it is correct and should be given.

Mr. Bridgeforth: We have a case in Ohio where the judge ruled a book must be viewed as a whole does not [fol. 225] apply to magazines where stories and pictures are not related to one area or the other.

The Court: It seems to me like counsellor that your instruction as drawn would leave the wrong impression in the minds of the jury. You start out and you say, "The test of obscenity is not whether it would arouse sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature or the highly prudish or the depraved, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated indifferent and unmoved." Why have that paragraph in there at all? You state that, "The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach."

Mr. Dunaway: The reason that we request that goes back to the difficulties which Your Honor mentioned a few minutes ago that for a jury to understand what is meant by the average man—and we feel that the instruction rather than confusing the jury will help point out to the jury that they have got to think about everybody, including those that are set forth in the first paragraph.

The Court: Well, in the second paragraph, whether the test is the effect upon all those whom it is likely to reach. [fol. 226] Now, this is a good statement. "In other words, you determine its impact on the average person in the

community." The magazines should be judged as a whole in its entire context—that should be modified to read "each article" must be judged as a whole in its entire context, not the magazine. Isn't that correct?

Mr. Bridgeforth: Does it cover the entire article though, not a particular segment of an article?

The Court: Yes. Now as modified here is the way this will read: "The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact on the average person in the community. Each article in the magazine should be judged as a whole in its entire context, and you are not to consider detached or separate portions of an article in reaching your conclusion."

Whereupon, the Court, overruled and refused to give Publisher's Instruction No. 4, as offered, and on the Court's own motion amended said instruction and gave it in its amended form, over the general objections and exceptions of the Publishers as follows:

PUBLISHER'S REQUESTED INSTRUCTION No. 4—(AMENDED)

"The test is the effect of the publication considered as a whole, not upon any particular class, but upon all those [fol. 227] whom it is likely to reach. In other words, you determine its impact on the average person in the community. Each article in the magazines should be judged as a whole in its entire context, and you are not to consider detached or separate portions of an article in reaching your conclusion."

Mr. Dunaway: Note our objection to the refusal of the Court to give our Requested Instruction No. 4 and to the refusal of the Court to give our Instruction as submitted.

PUBLISHER'S REQUESTED INSTRUCTION No. 5

"The mere fact that adulterous or other sexually immoral relationships are portrayed approvingly cannot serve as a reason for declaring a work obscene."

Whereupon, the Court refused to give the above Publishers' Instruction No. 5, over the objections and exceptions of the Publishers.

PUBLISHER'S REQUESTED INSTRUCTION No. 6

"The material at issue must have a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires."

Whereupon, the Court gave Publishers' Instruction No. 6, without objection.

PUBLISHERS' REQUESTED INSTRUCTION No. 7

"Nudity is not necessarily obscenity."

Whereupon, the Court refused to give Publishers' Re-[fol. 228] quested Instruction No 7 over the general objections and exceptions of the Publishers.

PUBLISHERS' REQUESTED INSTRUCTION No. 8

"The subject of sex is a great and mysterious force in human life. It is one of the vital problems of human interest and public concern. The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly truthfully all matters of public concern."

Whereupon, the Court refused the Publishers' Requested Instruction No. 8 over the general objections and exceptions of the Publishers.

PUBLISHERS' REQUESTED INSTRUCTION No. 9

"The burden is on the State to prove that each of the magazines in this case is obscene."

Whereupon, the Plaintiff objected to Publishers' Requested Instruction No. 9, as offered; Plaintiff's specific objection being as follows:

Mr. Brockman: Is that a burden proved beyond a reasonable doubt?

The Court: No, sir.

Mr. Brockman: I thought we had an instruction as to the preponderance of the evidence.

The Court: You are asking that the instruction be modified by a preponderance of the evidence? The modification will be granted.

[fol. 229] PUBLISHERS' REQUESTED INSTRUCTION No. 9—(AMENDED)

"The burden is on the State to prove that each of the magazines in this case is obscene, by a preponderance of the evidence."

Mr. Dunaway: Note our objection to the modification of our Requested Instruction No. 9 and the refusal of the Court to give it as submitted.

PUBLISHERS' REQUESTED INSTRUCTION No. 10

"There are eight magazines in evidence which the State alleges to be obscene. You must determine the obscenity or not of each magazine independently of the others and after reading of each magazine in its entirety, so that you may determine its dominant theme as a whole."

Whereupon, the Court refused Publishers' Requested Instruction No. 10 over the general objections and exceptions of the Publishers.

[fol. 230] After the Instructions had been given, the Court on its own motion further instructed the jury as follows:

The Court: The claim of constitutional freedom has been raised by several of these defendants. You are informed there is no Constitutional protection for filth, obscenity or prurience, for these serve no useful purpose to our society nor to any individual. The Court does not intimate either directly or indirectly that the magazines in question here or any one or more of them are filthy, obscene or prurient. That is the question for your gentlemen

to decide. It is claimed that the defendants are entitled to freedom. Under our system every citizen is entitled to freedom so long as he does not infringe upon the freedom of others. For example, our Constitution gives a citizen a right to bear arms, but he may not bear them so as to hurt others; he may not ship them within the city limits of many cities because to do so might endanger the safety of others. A free press is likewise guaranteed by our Constitution but that does not mean that a newspaper can print anything that it wishes about anybody. The newspaper may not use its columns for libel without being subject to such damages as a jury might assess. It is just as important to protect the character as it is to protect the reputation, as from libel, or to protect the body from firearms. In a free society such as ours the citizen must recognize his responsibility to use his freedom so as not to injure the freedom of others. History shows that freedom when-
[fol. 231] ever freedom is abused, freedom disappears. Gentlemen of the jury, do not reach your decision on a basis of who is the more skillful for this is not a contest of skill. This is a matter of vital concern to this entire community. If you find these magazines to be unfit for publication because they are obscene, then the Court will take such action as it deems appropriate. If you find they are not, then your findings will weigh heavily upon the Court. If all of you gentlemen agree in your answers to the interrogatories, whatever your answer may be, let the interrogatory be signed by one of your number as foreman. If nine of you only agree then let each one of the nine sign the interrogatories and you will return them in open Court when you have considered them. You will have the magazines submitted to you and will retire for the deliberation.

The above and foregoing were all of the instructions asked on behalf of either party hereto, and given, modified, refused, or given upon the Court's own motion at the trial of the cause mentioned in the caption.

[fol. 255]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

GENT, et al., Appellants,

v.

THE STATE OF ARKANSAS, Appellee.

APPEAL FROM THE JEFFERSON COUNTY CHANCERY COURT
FIRST DIVISION

Hon. Joseph Morrison, Chancellor

Abstract and Brief for Appellants

STATEMENT OF THE CASE

This appeal involves a review of the proceedings held in the Jefferson County Chancery Court under the provisions of Act 261 of 1961, Ark. Stats. (1947) 41-2713 *et seq.*, wherein certain nationally circulated magazines were found to be obscene and their continued circulation enjoined. All the magazines enjoyed second class mailing privileges under the laws of the United States.

[fol. 256] Act 261, the so-called Arkansas Law On Obscenity, provided a double-barrelled weapon for attack on alleged obscenity. The statute made possession or distribution of obscene printed matter a felony and provided stiff penalties of both fine and imprisonment for its violation. Other sections of the Act provided for a civil remedy in proceedings to be instituted by the Prosecuting Attorney in the Chancery Court to determine the obscenity *vel non* of allegedly offensive printed or written matter.

It was under the civil provisions of the law that the instant case arose. The criminal parts of the Act are not here directly in issue. Upon complaint of the Prosecuting Attorney that appellant magazines are obscene, the Chancellor made an initial ex parte finding that there was probable cause to find the magazines obscene, and issued an order for the magazines, their non-resident publishers, the local wholesale distributor and the Pine Bluff newsstand retailer to show cause why said magazines should not be adjudicated obscene.

Act 261 defined "obscene" as meaning "that to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Ark. Stats. (1947) §41-2715(2). [fol. 257] Appellant magazines and publishers denied that the publications are in fact obscene according to constitutional standards, and attacked the constitutionality of Act 261 as violative of the First and Fourteenth Amendments to the Constitution of the United States in abridging freedoms of speech and the press and in depriving appellants of their property without due process of law. Appellants further alleged violations of the Constitution of the State of Arkansas, Article II, Sections 6 and 8.

An advisory jury was impanelled on motion of the State. At the conclusion of an extended trial, and after deliberating twenty-five minutes, the jury found all the magazines in suit to be obscene. An immediate injunction issued restraining continued possession or circulation of any of the magazines. The court also retained jurisdiction to find future issues of appellant magazines to be obscene.

This appeal is by the magazines Swank, Modern Man; Bachelor, Cavalcade, Gentleman, Ace and Sir and by the publishers of each.

[fol. 258] POINTS TO BE RELIED UPON

I

The magazines are not obscene according to constitutionally permissible standards.

II

The injunction as issued was not authorized by Act 261 and amounts in effect to an unconstitutional prior restraint on future publication.

III

Although only advisory, the jury should have been composed of legally qualified jurors who were properly instructed as to the law:

(A) The court erred in not excusing certain jurors because of their answers on voir dire when challenged for cause.

(B) The trial court erred in not properly instructing the jury as to the standards to be used in determining whether the magazines were obscene.

IV

The evidence of other magazines currently being circulated and newspaper stories and advertising offered by appellants for the purpose of aiding in determining contemporary community standards should have been admitted.

[fol. 259]

V

The court erred in refusing to permit appellants' counsel on cross examination to ask the State's witnesses whether they considered certain books and other publications obscene.

VI

Act 261 as applied violates the First and Fourteenth Amendment to the Constitution of the United States in abridging freedoms of speech and press and in depriving appellants of their property without due process of law.

VII

Act 261 as applied violates Article II, Section 6, of the Constitution of Arkansas in that it deprives appellants of liberty of the press and a free communication of thoughts and opinions; and is violative of Article II, Section 8, of the Arkansas Constitution in that it deprives appellants of their property without due process of law.

* * * * * * *

[fol. 270]

ANSWER OF W. E. BURNHAM, JR., AND JOHN NICKELL TO AMENDMENT TO COMPLAINT—Filed April 13, 1964

The defendants for answer to the amendment to the complaint adopt and renew the statements and allegations of their original answer and pray that the Court enter an order directing what action they shall follow and for all equitable relief (Filed April 13,1964).

MOTION—Filed April 13, 1964

The State of Arkansas moves the court to impanel a jury and for cause states: That due to the unique character of this case, a jury would provide invaluable assistance in the [fol. 271] determination of the issues involved herein, and pray the Court to exercise its discretion and order a jury to be impaneled to assist in the determination of the issues (Filed April 13, 1964).

At page 32 appears a motion for leave to file response for Gent Magazine and Par Publications, Inc. At page 35 appears a response of Gent Magazine and Par Publications, Inc. These pleadings do not concern these appellants and we presume will be abstracted by counsel for Gent and Par Publications, Inc.

(The following was the one of several interrogatories submitted by the Court, which the jury answered.)

Interrogatory No. 1

Q. Are all the magazines involved in this action obscene?

A. Yes.

Signed T. J. Thornton, Foreman

Decree

On this day this cause comes on to be heard, the State of Arkansas appearing by E. W. Brockman, Jr., Prosecuting Attorney, and by Harley Cox and William C. [fol. 272] Bridgeforth; the defendants W. E. Burnham, Jr., and John Nickell appearing in person and by their attorney, Jay W. Dickey; the defendant magazines Swank, published by Royal Publications, Inc; Modern Man, published by Copyright Developers Corp.; Bachelor, published by Magtab Publishing Corp.; Cavalcade, published by Skye Publishing Co., Inc.; Gentleman published by Bruce Royal Publishing Co.; Ace, published by Four Star Publications, Inc.; Sir, published by Volitant Publishing Corp., represented by Edwin E. Dunaway and Robert C. Downie; a motion filed by Gent magazine published by Par Particulars (sic) by its attorney H. Murray Claycomb, praying that it be permitted to file response, said motion was denied and that although denied proof was heard as to claims against Gent magazine.

The Chancellor directed a drawn jury to be selected in the same manner as one is selected by laws to try civil matters, a jury should be chosen from the regular venire which had been selected by Jury Commissioners for the current term.

This cause was heard by the Chancellor and the jury upon the testimony of witnesses, exhibits thereto and other matters and things before the Court.

[fol. 273] The Court finds: the jury by unanimous verdict found the following publications are obscene: Gent magazine, February, 1964, issue; Swank magazine, March, 1964, issue; Modern Man, February, 1964, issue; Bachelor magazine, March, 1964, issue; Cavalcade magazine,

February, 1964, issue; Gentleman magazine, April, 1964, issue; Ace magazine, March, 1964, issue; Sir magazine, March, 1964, issue.

The Court also found the above magazines to be obscene; that defendants should be enjoined from sending or causing to be sent, bringing or causing to be brought into Jefferson County, or for sale or commercial distribution in Jefferson County or preparing, selling, exhibiting or commercially distributing, giving away or offering to give away or possessing any of the above magazines with the intention to sell or commercially distribute or give away or offering to give any of said magazines away subject to further orders of this Court.

That all of the above described magazines should be destroyed and that the defendants are given ten days in which to destroy said magazines.

The Court finds that said magazines are obscene and it specifically retains jurisdiction to determine whether any future issues are obscene and whether or not they come within the terms of this order; that defendants are hereby [fol. 274] notified that any future distribution of obscene publications as set out and found above to be obscene will also be restrained and enjoined and magazines will be removed.

It is, therefore, considered, ordered, adjudged and decreed that defendants John Nickell, W. E. Burnham, Jr., Par Particulars, (sic) Inc., Royal Publications, Inc., Copyright Publishers Development Corp. Magtab Publishing Corp., Skye Publishing Co., Inc., Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp. be, and they hereby are restrained and enjoined from selling, exhibiting or commercially distributing any of the following magazines: (Here the Court designates the same issues of the same magazines set forth in the Complaint.) or giving away or offering to give away said magazines or possessing any of said magazines with the intent to sell or commercially sell or give away or offer to give away any of said magazines in Jefferson County, Arkansas.

It is further by the Court considered, ordered, adjudged and decreed that the defendants be, and they are hereby ordered and directed to refrain from sending or causing to be sent, bringing or causing to be brought into this County for sale or commercial distribution or in Jefferson County, Arkansas, preparing, selling, exhibiting or com- [fol. 275] mercially distributing any of the above described magazines, giving away or offering to give away or possessing said magazines with the intent to sell or commercially sell or distribute or give away or offer to give away any of said magazines in Jefferson County, Arkansas, and the defendants be, and they are hereby ordered and directed to destroy said magazines.

It is further considered, ordered and decreed that the defendants are hereby notified that any future distribution or sale of the above magazines which are of like obscene character comparable to the above issues of said magazines, will be enjoined upon a showing that said magazines are obscene, and the Court retains jurisdiction of this cause of action to carry out the terms and conditions of this order and to make such orders as may be necessary concerning the sale of the following described magazines in the future: Gent, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace or Sir magazines.

To which decree the defendants object.

/s/ Joseph Morrison
Chancellor

(Dated May 13, 1964, and entered *nunc pro tunc* as of April 29, 1964) (T.44-47.)

[fol. 276]

Notice of Appeal

Notice is hereby given that the defendants Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp.,

Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., appeal to the Supreme Court of Arkansas from the judgment and decree of the Court dated May 13, 1964, and entered *nunc pro tunc* as of April 29, 1964 (T.50) (Filed May 20, 1964).

Designation of Record

Defendants, Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir magazines, and Royal Publications, Inc., Copyright Publishers' Development Corp., Magtab Publishing Corp., Skye Publishing Co., Bruce-Royal Publishing Corp., Four Star Publications, Inc., and Volitant Publishing Corp., designate the entire record as the record on the appeal (Filed May 20, 1964) (T.51).

Motion

Motion by appellants to grant extension of time for filing the record and docketing the appeal to November 27, 1964 (Filed August 14, 1964 (T.56).

[fol. 277]

Order

The time for filing the record and docketing the appeal in this cause in the Supreme Court of Arkansas is extended to November 27, 1964. (Dated August 14, 1964) (T.57).

Reporter's Transcript

Be it remembered, that on the 28th and 29th days of April, 1964, before the Honorable Joseph Morrison and a jury, the above entitled cause came on for trial, and in the course thereof evidence was introduced, objections made, exceptions taken, and other proceedings had, which are as follows, to-wit:

Appearances

Mr. E. W. Brockman, Jr., Prosecuting Attorney Coleman, Gantt, Ramsay & Cox, by E. Harley Cox, Jr., and William Bridgeforth, for Plaintiff.

Dunaway & Downie, by Edwin Dunaway and Robert Downie, for defendants Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace and Sir Magazines, (and for the publishers of each).

Gregory & Claycomb, by Mr. Murray Claycomb, for Gent Magazine (and its publisher).

[fol. 278] Mr. Jay W. Dickey, for the defendants John Nickell and W. E. Burnham, Jr.

* * * * * * *

[fol. 279] Direct examination.

Mr. W. E. Burnham, one of the defendants, testified:

* * * * * * *

[fol. 280] Q. Now are these magazines that are involved in this lawsuit also distributed by the wholesalers all over the State of Arkansas.

A. Yes, sir.

Mr. Brockman: I object to that.

The Court: I don't see where that would be important.

Mr. Dunaway: It is important Your Honor in that under our contention that under the latest case the community standard by which obscenity is tested is the national standard. The reason we are asking the question is to show that these magazines are generally sold and accepted in the State of Arkansas and my next question was going to be whether this was also true nationally.

The Court: What does the State say about it?

[fol. 281] Mr. Brockman: Your Honor, I am sorry I didn't quite get all of his offer. I don't think the standard is nationwide; I think it is purely what the law is, would be what applies in Jefferson County.

Mr. Dunaway: Your Honor, I am not arguing that point now but we will argue it but I am explaining my asking this question.

The Court: It would be pertinent now because if the matter was not nationwide, if the standard was not to be judged on a nationwide basis then the evidence would be incompetent, outside of his own territory and outside of his own Pine Bluff community. Are you offering the fact that the magazines are sold as evidence of a nationwide standard of morality?

Mr. Dunaway: Nationwide standard of what is not obscene and further—

[fol. 282] The Court: (Interrupting) The question of whether it is obscene is the question in the lawsuit. Now that is for the court to decide with the aid of the jury. Now the mere fact of sale doesn't make it either more or less obscene or prurient. It doesn't affect it one way or the other. The obscenity is in the nature of the matter of itself. I don't believe it would be competent to go into this outside of his own district.

Mr. Dunaway: Note our objections to the refusal of the court to let us ask as to the circulation in other places in the State of Arkansas and also on a national basis.

* * * * * * *

[fol. 302] The Court: . . . Gentlemen, there will be a permanent restraining order restraining the sale of these magazines in this district.

Mr. Dunaway: Did I understand the court correctly to say that the sale of all these magazines is permanently restrained and the injunction will not be confined to the issues of the magazines which are in the suit?

[fol. 303] The Court: That's right (T.232).

The Court: Of course you object. Now that restraining order is in effect now. I don't want any of these magazines sold—these eight magazines so advise your clients (T.233).

By Leave of the Court, the Defendant Publishers, introduced the following Exhibits.

Mr. Dunaway: At this time I want to make the tender of proof which was overruled, certain newspaper articles, editorials and advertisements tending to show the community standards. The items are those which would have been introduced had the court permitted their introduction. Exhibit No. 1, an article appearing in the Arkansas Gazette, April 26, 1964, headlined "Orgy at the Beach—or Spring Revels of College Set."

(Copy of Publishers' Exhibit No. 1 may be found at page 239 of this transcript.)

[fol. 304] Mr. Dunaway: Exhibit No. 2, Picture and Article concerning State Public Library Trustees discussion of censorship, Arkansas Gazette, Friday, April 24, 1964.

(Copy of Publisher's Exhibit No. 2 may be found at page 240 of this transcript.)

Mr. Dunaway: Movie advertisement for movie, "The Playgirls and the Vampire," Pine Bluff Commercial, March 3, 1964.

(Copy of this Publisher's Exhibit No. 3 may be found at page 241 of this transcript.)

Mr. Dunaway: Exhibit No. 4, Movie ads showing picture of Jane Mansfield for movie "Promises! Promises!" and an ad for movie "Move Over Darling," Pine Bluff Commercial, March 6, 1964.

(Copy of this Publisher's Exhibit No. 4 may be found at page 241 of this transcript.)

[fol. 305] Mr. Dunaway: Exhibit No. 5, Movie ad for movies "Dr. No." and "Mail Order Bride," Pine Bluff Commercial, March 13, 1964.

(Copy of Publishers' Exhibit No. 5 may be found at page 242 of this transcript.)

Mr. Dunaway: Exhibit No. 6, Movie ads for "Fun in Acapulco" and "Blood Feast," Pine Bluff Commercial, March 21, 1964.

(Copy of Publishers' Exhibit No. 6 may be found at page 243 of this transcript.)

Mr. Dunaway: Exhibit No. 7, movie ad for "All the Way Home" Pine Bluff Commercial, February 21, 1964.

(Copy of Publishers' Exhibit No. 7 may be found at page 244 of this transcript.)

[fol. 306] Mr. Dunaway: Exhibit No. 8, Movie ad "Under the Yum Yum Tree," Pine Bluff Commercial, January 15, 1964.

(Copy of Publishers' Exhibit No. 8 may be found at page 245 of this transcript.)

Mr. Dunaway: Exhibit No. 9, movie ads listing number of movies to appear at the Saenger Theatre and an ad for movie, "The Playgirls and the Bell Boy," Pine Bluff Commercial, January 1, 1964.

(Copy of Publishers' Exhibit No. 9 may be found at page 246 of this transcript.)

Mr. Dunaway: Exhibit No. 10, Editorial, "The Censors Go to Court," Pine Bluff Commercial, January 12, 1964.

(Copy of Publishers' Exhibit No. 10 may be found at page 247 of this transcript.)

[fol. 307] Mr. Dunaway: Exhibit No. 11, Editorial "Morality and Censorship" and column headed "Behind the News,—When is a Censor Not a Censor?" Pine Bluff Commercial, November 3, 1963.

(Copy of Publishers' Exhibit No. 11 may be found at page 248 of this transcript.)

Mr. Dunaway: Exhibit No. 12, Editorial "A Censorship Committee," Pine Bluff Commercial, October 20, 1964.

(Copy of Publishers' Exhibit No. 12 may be found at page 249 of this transcript.)

Mr. Dunaway: Exhibit No. 13, ad "Wives and Lovers" Pine Bluff Commercial, October 20, 1963.

(Copy of Publishers' Exhibit No. 13 may be found at page 249 of this transcript.)

[fol. 308] Mr. Dunaway: Exhibit No. 14, movie ad "Who's Been Sleeping in My Bed" Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 14 may be found at page 250 of this transcript.)

Mr. Dunaway: Exhibit No. 15, ad for "The Bellboy and the Playgirls," Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 15 may be found at page 250 of this transcript.)

Mr. Dunaway: Exhibit No. 16, Editorial, Guidelines," Pine Bluff Commercial, December 31, 1963.

(Copy of Publishers' Exhibit No. 16 may be found at page 251 of this transcript.)

Mr. Dunaway: That—is all the newspapers. Then further tender of proof in connection with the testimony of Mr. William Burnham, we would like for the record to [fol. 309] show that had Mr. Burnham been permitted to answer the question he would have testified that he is the distributor for "Playboy" magazine and that this magazine is distributed in Pine Bluff and would have identified a copy of "Playboy" magazine for April, 1964, and it would have been introduced as Exhibit 1 to his testimony.

(Copy of Publishers' Exhibit No. 17 is submitted under separate cover with the other magazines introduced in evidence.)

(T.234-237).

The reporter's certificate appears at transcript 252; the Clerk's Certificate appears at transcript 253, and the Statement of Costs at 254.

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[fol. 312]

II

The injunction as issued was not authorized by Act 261 and amounts in effect to an unconstitutional prior restraint on future publication.

Immediately after the jury had returned its verdict the court announced that there would be a permanent restraining order restraining the sale of these magazines and that the injunction would not be confined to the issues of the magazines involved in the lawsuit (Abs.152).

In the decree as entered, the court's position was modified. Only the circulation of the specific issues in suit was enjoined. However, the court went on to make this additional finding: "... that said magazines are obscene and it specifically retains jurisdiction to determine whether any future issues of said magazines are obscene and whether or not they come within the terms of this order ..." (Abs.19-20).

This decree goes beyond what is authorized by the statute. Act 261 seems plain in its terms. The printed matter sought to be banned must be specifically set out and the injunction must specifically name that which is restrained from being circulated. Ark. Stats. 41-2718, 41-2723.

[fol. 313]

VI

Act 261 as applied violates the First and Fourteenth Amendment to the Constitution of the United States in abridging freedoms of speech and press and in depriving appellants of their property without due process of law.

The finding of the Chancellor that appellant magazines were obscene, in the face of applicable constitutional tests of obscenity, and the issuance of the injunction shown by the record, violated appellants' rights of free speech and free press under the First and Fourteenth Amendments

to the Constitution of the United States and deprived them of their property without due process of law.

VII

Act 261 as applied violates Article II, Section 6, of the Constitution of Arkansas in that it deprives appellants of liberty of the press and a free communication of thoughts and opinions; and is violative of Article II, Section 8, of the Arkansas Constitution in that it deprives appellants of their property without due process of law.

For the reasons heretofore stated, the injunction issued was in violations of appellants' rights under the Constitution of Arkansas.

[fol. 314]

IN THE SUPREME COURT OF ARKANSAS

No. 5-3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMEN, ACE AND SIR MAGAZINES, Appellants,

v.

STATE OF ARKANSAS, Appellee.

Appeal from the First Division Chancery Court of Jefferson County, Arkansas.

* * * * * * *

Honorable Joseph Morrison, Chancellor.

SUPPLEMENTAL ABSTRACT AND BRIEF FOR APPELLANT GENT MAGAZINE - PAR PUBLICATIONS, INC.

Statement of the Case

To eliminate undue repetition of the facts, Appellant Gent Magazine - Par Publications, Inc., adopts the state-

[fol. 315] ment of facts made by the other seven Appellants and supplements it with the following additional statement.

After the Complaint was filed commencing the action, the Court issued an order to each of the Appellants directing that they show cause why they should not be declared obscene on or before March 12, 1964. On March 11 or 12 a joint Answer was filed for all eight appellants, the Court being advised at time by the attorneys filing the Answer, that they had been asked to file an Answer on behalf of Gent Magazine by their clients although they had not been directly contacted by Gent Magazine yet. The same day a telegram to the Chancellor was delivered from the general counsel for Gent Magazine indicating that they had not yet obtained local counsel and requesting a reasonable extension of time to retain counsel to oppose the Complaint.

The Chancellor replied to the Gent Magazine's general counsel that the telegram had been received and the cause continued to be heard April 28.

By letter of the same date, the Court directed Mr. Downie to withdraw the Answer previously filed on behalf of Gent and advising of the telegram. The Answer was [fol. 316] then withdrawn. Local counsel for Gent was obtained April 20 and a Motion to File a Response and the Response was tendered to the Court April 24. On April 28, 1964 the case came on for trial and the Court ruled that Gent's Response would not be allowed and that Gent could not be represented in the hearing by counsel or participate in the trial. Thereafter, the cause proceeded to trial as set out in the statement of the other seven Appellants.

After the trial, this Appeal was taken by Par Publications, Inc., the publisher of Gent Magazine.

[fol. 320]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

GENT, SWANK, MODERN MAN, BACHELOR, CAVALCADE, GENTLEMAN, ACE AND SIR MAGAZINES, Appellants,

—v.—

STATE OF ARKANSAS, Appellee.

Appeal from the First Division
Chancery Court of Jefferson County, Arkansas

OPINION DELIVERED—May 24, 1965

Modified and Affirmed.

CARLETON HARRIS, Chief Justice.

This appeal is from a Decree of the Jefferson Chancery Court, holding that certain magazines were obscene. The court enjoined the appellants from sending, bringing, or causing to be brought, into Jefferson County for sale, exhibit, or gift, any of these magazines, and ordered them destroyed. Jurisdiction was retained to determine whether any future issues are obscene, and appellants were "notified that any future distribution of obscene publications, as set out, and found above, to be obscene, will also be restrained and enjoined and magazines will be removed." Included in the injunction were W. E. Burnham, Jr., county distributor of the magazines, and John Nickell, operator of a newsstand, which sold the magazines. The particular publications held to be obscene were *Swank, Gent, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir.*[1]

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[1] Actually, this court would be justified in dismissing the appeals because of non-compliance with Rule 9. We recognize that the contents of the magazines could not be fully abstracted, but we

[fol. 321] The case arose upon complaint of the Prosecuting Attorney that the magazines were obscene, and in violation of Act 261 of the General Assembly of 1961 (Ark. Stat. Ann. §41-2713-2728 [Repl. 1964]). The Chancellor impaneled, on motion of the state, an advisory jury, which, at the conclusion of an extended trial, unanimously found all magazines listed to be obscene. The court also found the magazines to be obscene, and issued its injunction. From the decree so entered, appellants bring this appeal.

One preliminary matter needs to be disposed of. The court refused to permit *Gent* to file an answer, holding that the answer had not been tendered in time, and the judgment, as to this publication, was taken by default. We think the court erred. General counsel for the publication of *Gent,* in New York, wired the court on March 11, 1964, asking for a continuance, for the purpose of obtaining suitable counsel. The Chancellor replied by letter, acknowledging the telegram, and stating, "The cause was continued yesterday to be heard April 28, at 9:30 AM." Local counsel was subsequently retained, and tendered a response on April 24. We think the Chancellor's reply, which neither denied the request, nor indicated that the court had no authority to grant same, could well have been taken by New York counsel to mean that *Gent* had until April 28 to file an answer. Accordingly, appellant's request that it be made a party to this appeal, and that its argument on the merits of the appeal be considered by this court, is granted.

For reversal, seven alleged errors are asserted; however, some of these errors relate to the selection of, and instruc-

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know of no reason why copies of each magazine offered in evidence could not have been furnished for each judge to examine. The inconvenience occasioned by seven different judges examining the one copy of each magazine is obvious. However, because of the importance of, and interest in, the case, we have separately inspected the exhibits in order to reach a determination on the merits of the litigation.

tions given to, the jury. Error is also asserted because of the court's refusal to admit into evidence other magazines and articles, as a matter of comparison, and the refusal to permit counsel to inquire from the state's witnesses whether [fol. 322] they considered these other publications obscene. However, during oral argument before this court, counsel for all appellants requested that we make a determination on the merits, *i.e.*, that we decide whether the magazines are obscene, rather than remand the case because of error committed during the trial. We therefore, do not consider the alleged errors heretofore mentioned. Suffice it to say that we agree that procedural error was committed, but in compliance with appellants' request, we disregard legal mistakes committed in selecting and instructing the jury, and proceed to a discussion of the principal issue.[2] In doing so, we enter into a field marked and characterized by uncertainty. In fact, we know of no area of the law in which there is more confusion, and the most recent opinion handed down by the nation's highest court, rather than contributing to clarity, has actually compounded the confusion.

In 1957, the United States Supreme Court decided the case of *Roth* v. *United States*, 354 U. S. 476. After holding that obscenity is not within the area of constitutionally protected speech or press, the court stated:

"The early leading standard of obscenity allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons. Regina v. Hicklin [1868] LR 3 QB 360. Some American courts adopted this standard but later decisions have rejected it and substituted this test: *whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to*

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[2] A jury in Chancery Court acts in an advisory capacity only, the court not being bound by jury findings. In this case, both the jury and the Chancellor reached the same conclusion.

prurient interest.[3] The Hicklin test, judging obscenity by the effect of isolated passages upon the most susceptible persons, might well encompass material legitimately treating with sex, and so it must be rejected as unconstitutionally restrictive of the freedoms of speech and press. On the other hand, the substituted standard provides safeguards adequate to withstand the charge of constitutional infirmity."

[fol. 323] Following this decision, a number of states, through their legislatures, adopted the italicized standard. In 1961, the Arkansas General Assembly passed Act 261, which defines the word, "obscene," in the exact language set forth in the *Roth* case.

Appellants, for reversal, rely upon the more recent case of *Jacobellis* v. *Ohio,* 378 U.S. 184, and assert that this case makes clear that the "contemporary community standards," mentioned in *Roth,* actually refers to a "national" community, rather than a "local" community. Appellants vigorously argue that *Jacobellis* determined conclusively that the "national community standard" must be applied. We cannot accept this contention, since it does not appear that five judges, constituting a majority of the court, agreed upon the "national community" standard. The case was decided by a six to three vote, in which the lower court was reversed. There was no court opinion. Mr. Justice Brennan announced the decision, and wrote an opinion. Mr. Justice Goldberg concurred in Mr. Justice Brennan's opinion, but also filed a separate opinion of his own. Justices Douglas, Black, and Stewart concurred in the judgment of reversal, the first two on the basis that the Constitution does not permit censorship at all, and Mr. Justice Stewart, in a separate opinion, stating that the constitution only permits censorship of "hard core pornography;" further, "I shall not today attempt further to define the kinds of material I understand to be embraced

[3] Emphasis supplied.

within that short-hand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not [fol. 324] that." Mr. Justice White concurred in the judgment for reversal, without expressing a reason. The Chief Justice, joined by Justice Clark, in a dissenting opinion, rejected the national standard, which Justices Brennan and Goldberg stated the court must apply. Mr. Justice Harlan likewise dissented, saying:

"* * * The more I see of these obscenity cases the more convinced I become that in permitting the States wide, but not federally unrestricted, scope in this field, while holding the Federal Government with a tight rein, lies the best promise for achieving a sensible accommodation between the public interest sought to be served by obscenity laws and protection of genuine rights of free expression. * * *"

Thus, it appears that only two justices of the prevailing six adopted the national community standard. It is therefore evident that a majority of the court, whatever may be the thinking, have not flatly said that the national standard must be applied. Much has been written about the *Jacobellis* case, and we think one of the most comprehensive articles (or notes) appears in 40 Notre Dame Law., P. 1 (Dec. 1964).[4] The article states:

"According to the opinion of Mr. Justice Brennan in *Jacobellis* v. *Ohio,* the Supreme Court itself must weigh and decide the issues in obscenity cases; it must decide whether the disputed material is obscene; and it must decide this according to the standards of the community, that is, the whole country—all 50 States. In other words, the Court must apply a national standard. This note is addressed primarily to that opinion."

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[4] The note was prepared by Joseph O'Meara, Dean of the Notre Dame Law School, and Thomas L. Shaffer, Assistant Professor of Law of the Notre Dame Law School.

After pointing out that, though critical, the writers in [fol. 325] tend nothing derogatory toward the court or its individual members, it is further stated:

"Indeed, it is precisely because of our respect that we venture to suggest what seems to promise a way out of the *total confusion* which envelops the problem of obscenity as a result of the opinions in some recent Supreme Court cases and the entire absence of opinion in others."

The article then notes that Justice Brennan sets out in his opinion that the Supreme Court must ultimately decide when a particular work is obscene, and the article poses the question of the logic of the court itself deciding obscenity cases when it does not decide for itself matters of equal or greater importance; for instance, whether a convicted murderer, when firing a fatal shot, was capable of distinguishing right from wrong, or was under a compulsion so strong that he was without power to resist it. These matters, of course, are determined by a jury. It is the opinion of the writers of the article that the Supreme Court, in deciding that it is the duty of the court to make its own independent decision of the issues in obscenity cases, has committed itself to an impossible task.

"Not only has the Court assumed an impossible task, that is, to make its own independent decision of the issues in obscenity cases, but, in so doing, if the opinion of Mr. Justice Brennan is followed, it must apply an absolutely impossible test, that is, the standard in such matters of the Nation as a whole.

"As a matter of *fact* there is no national community standard. Large cities are much more permissive, by and large, than smaller towns and farming areas, and standards vary not only according to the size of the community but according to geographical location as well. • • •

"• • • And to go back to population, the standard varies from one large city to another. Thus, it appears that [fol. 326] practices are permitted in the Nation's capital which are not tolerated in New York or Chicago.

"Further examples of the *fact* that standards vary from one community to another come readily to mind. Consider, for instance, the State of Nevada where gambling is legalized; where prostitution flourishes openly; and where divorce is easier to obtain than almost any other place in the present-day world. Are the morals and mores of that State no different from the morals and mores of, say, New England? * * *

"Confronted, as it is, by conflicting standards, lax in one community, strict in another, what is the Court to do? If it succeeded in imposing the standard of, say, Washington, D.C., or of Reno, on the rest of the Country, it would be imposing a standard which is repugnant to perhaps a majority of the people of the Nation, particularly in the smaller towns and rural areas. And, of course, the reverse would be equally true.

"Even as regards the big cities, there is no 'community standard.' There are many and conflicting standards; and our legal institutions provide judges no mechanism for ascertaining what they are, sorting them out and selecting one as controlling. The inevitable effect of this is that each member of the Court will apply his own standard. But that is historically the role and function of the jury. The jury is the mechanism provided by the common law for determination of questions involving the presence or absence of due care, reasonableness, prudence, decency and other concepts reflecting the common sense and/or conscience of a community. And the jury can do it better than the members of our highest tribunal. But, of course, the jury could not and would not reflect a *national* standard, because such a standard is a fiction pure and simple."[8]

Summarizing the views expressed in the several *Jacobellis* opinions, it is obvious that the court, in the final analysis, determines obscenity cases *de novo,* but the standard applied is not so readily apparent.

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[8] 13 Kan.L.Rev., P. 117 (1964), also contains an interesting article entitled "Obscenity: The Search for a Standard."

The stories and pictures in the eight magazines in question, in the main, deal with the theme of sex. The pictures generally portray side or back views of young females, totally unclad, or front views of the girls, unclad from the waist up. A large number of the stories, or articles, deal [fol. 327] with adultery or fornication, the number varying in the several magazines.[6] In fact, all can be classified under the general term, "girlie" magazines. A few examples of the type of stories, or articles, found will illustrate the general theme. For instance, the following is an excerpt from a story in *Ace,* entitled, "On the Level:"

"The window was open.

"I tugged at the shade and it snapped up with a swish, and there I was gazing at the two most perfect breasts in creation. Full they were, and round and firm, and by any criterion, utterly fantastic. She was powdering them with a fluffy pink puff, and as the shade flew up she paused in mid-puff. • • •

"She was lovely, but there was something wrong in the way she looked, in the tilt of her head, in the raven shimmer of her lustrous black hair, in the feline greenness of her eyes. And then I knew what it was—she was on her feet.

"Just as Goya's nudes would look ludicrous standing up, and Botticelli's undraped beauties would look foolish except lying down, so this chick was made for the horizontal; and while she was great standing upright, I knew that on her back she'd be sensational. • • •

"We reacted to one another as if we were oppositely magnetized. My mouth was on her lips—moist, full, red

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[6] No effort is made in appellants' briefs to point out differences in the articles, or pictures, from the different magazines, i.e., one magazine might possibly contain obscene material, but another particular magazine does not. It is simply the contention of appellants that none of the magazines can be classified as obscene, under the law as declared by the United States Supreme Court; a separate argument is presented by *Gent,* which is represented by different attorneys.

lips. I've a thing for lower lips. The chick can be a dog, as long as the lower lip is a full, soft one.

"She intertwined herself about me, nudely white from cascading raven hair to scarlet toenails, and the sensation was not of this world. I could feel the sleek perfection of her body through my clothes, her ruby-tipped breasts pushing against me impatiently. I felt her soft arms around me, under my arm-pits, as she hooked her exquisitely manicured hands at my shoulders, thrusting her dancer's belly toward me.

"And I suddenly realized that we were standing by the open window. Not only could we be seen in sharp relief against the white apartment walls by everyone in neighboring apartments, but my colleague, a fellow student, might come looking for me any moment. I pried loose, and the chick let go with low moans that set my hair climbing. I'd been right. She was the type that digs. What might have been foolish prematurity had turned out to be telling perception. She was a chick who thought 'horizontally.' • • • [fol. 328] "• • • What it was with her, I couldn't quite pin down, but she never made love in the dark, and always with the blinds up—and once while there was a girl friend in the living-room. It got to be a bit embarrassing. But she was a cool sketch, and she knew how to use that horizontal body of hers—*so well*. I didn't really give a damn."

In *Bachelor*, a particularly obnoxious (to us) article appears, entitled "Those Free-Loving Coeds—Why Every Man Should Go To College." The opening paragraphs of this article (giving some idea of the nature of the remainder of the story) are as follows:

"If you're a young man with plenty of initiative, zip and get-up-and-go, the place to be right now is in college. Just think of all the advantages. I don't mean the ordinary ones of being exposed to the great minds of science and the arts, learning from brilliant instructors and preparing yourself for a career. The advantages I'm talking about are even

more important and have to do with meeting the most willing group of coeds ever to invade the campus scene.

"The fact is, today's crop of college girls are not only loving more—but they are more lovable, too. And it all goes to give Joe College fonder memories of his Alma Mater to take with him when he graduates.

"Only recently, for example, an anonymous senior from a large coed university in the middle-West was asked by an interview why his school had so few panty-raids, in comparison with some of the all-male Eastern schools.

"The senior grinned. 'Why *should* we have panty raids, here?' he asked. 'They are all right for guys who can't get enough of the real thing. The girls in this school, though, keep us perfectly happy and content.'"

Again, in *Ace,* the story, "39 Inches of Femme Fatale," commences as follows:

"'You are a bitch!' Louise said.

"'Yes, aren't I?' Carla Sanders laughed indulgently. 'And right here is 39 uptilted inches of bitchiness that I intend to make pay off.' Insultingly she cupped her hands under her breasts."

From *Cavalcade,* "The Wrong Chimney:"

[fol. 329] "'Shh,' she murmured.

"She lifted his hand to cup her full breast, and turned a bit, her eyes closed, lifting her face to kiss him on the mouth, her rich lips parted. His hand felt her warm softness and moved of itself, amorously, his other hand automatically reached behind her, caressing, his mouth felt her warm lips and the tip of a tongue going into his, darting, exploring.

"She drew her face back a little, breathing fast, her eyes still closed. He looked at the lovely features he'd dreamed of so often looking just this way, with the same eager, surrendering expression, and reached for her again.

"'You were late,' she said softly. 'I was afraid . . . . Don . . .'

"She stopped talking as her mouth again met his. Then it penetrated . . . Don, she'd said. He started to draw back but he couldn't, he wanted her too much. He raised his hand a little to the back of her proud lovely neck and kept her mouth pressed to him. Then he thought . . . polite . . . proper . . . courteous . . . an officer and a gentleman, and pulled his seeking lips from her eager mouth.

" 'Hurry,' she said, her eyes still closed. 'We only have a few minutes.' "

We recognize that articles, or stories, (and pictures) dealing with sex are not necessarily obscene. The material only becomes obscene when it deals with sex in a manner appealing to prurient interest. Of course, there are frequently pictures or drawings in health and art magazines, which might be said to deal with sex, but such magazines would not be considered obscene, because their *dominant theme* relates to health or art. In Lockhart and McClure, "Censorship of Obscenity," 45 Minn. L. Rev. 5, Page 91, we find:

"In applying the requirement that material must be judged as a whole and by its dominant theme, courts have often spoken of the relevance of the objectionable parts to the dominant theme. If the objectionable parts are relevant to the dominant theme, courts ordinarily have found the material not obscene. But if the parts are irrelevant to the theme and independently obscene themselves, courts have usually found the material obscene . . . "[7]

[fol. 330] There are articles, or stories, in these eight magazines, which would not be considered obscene, but, in viewing the total contents of each of these publications, we think it can well be said that their dominant theme appeals only to the coarse and base in man's nature, and

[7] It is mentioned also that some pornographers "may seek to disguise the pornographic nature of the dominant theme of the materials they assemble, by the inclusion of some material that is clearly legitimate."

any literary merit is entirely coincidental. It is evident that the portrayal of sex in these magazines appeals to the prurient interest.

Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco,[8] nor is there any way for us to know the "standard" of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards [fol. 331] in Pine Bluff, Arkansas.[9]

We know not what the United States Supreme Court may hold as to these magazines, or the validity of Act 261. Let it here be said that, if a firm and clear guideline had been established, we would certainly follow it, for we recognize that the rulings of the United States Supreme

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[8] The press carried an account, datelined San Francisco, May 9 of this year, as follows: "Bosoms were bared again Saturday as bawdy North Beach celebrated the acquittal of its topless dancers and fashion models.

"Two separate juries brought in the innocent verdicts Friday, vindicating nightclub owners and their busty showgirls of police charges of lewd conduct."

It is interesting to note that the trial judge, in directing the jury to return a verdict of not guilty, stated: "No police officer can substitute his personal feelings of what is right or wrong.

"The test is not what a couple of people feel. The test is what the people of San Francisco feel."

This occurrence points up the difference in the standards over the nation, for women appearing in this state in similar "attire" (or lack of it) would be in violation of the criminal statutes.

[9] The State's witnesses were Reverend J. W. Watson, Pastor of Lakeside Methodist Church in Pine Bluff, Carl Welch, a business leader of the city, B. E. Whitmore, County School Superintendent of Schools, Reverend Pirtle, Pastor of Second Baptist Church of Pine Bluff, Arthur C. Hendrix, Assistant Probation Officer of Jefferson County, and Norman Young, Chief of Police of the City of Pine Bluff.

Court are controlling, and, in conformity to the legal process, must be adhered to. But, as previously pointed out, we find no definite determination by a court majority that a "national standard" shall apply.

Appellants contend that the injunction granted by the Chancellor is clearly illegal in that it bans future issues of the magazines. The Attorney General concedes that the dissemination of future issues of publication may not be enjoined simply because its past issues have been found to be offensive. But we, like the Attorney General, do not find that the injunction operates to that extent. The decree clearly provides that the particular issues of the pertinent magazines (introduced into evidence) shall not be sold, but it does not enjoin future issues. The court simply finds that future distribution or sale of future issues of the magazine will be enjoined upon a showing that such magazines are obscene. This means, of course, that a hearing (or trial) would be held before any order was rendered. [fol. 332] Actually, the trial court would have the authority, upon proper complaint being made, to hold such a hearing, irrespective of whether reference was made to future issues in the present decree.

We do not agree with appellants that Act 261, as here applied, violates the First and Fourteenth Amendments to the Constitution of the United States, as abridging freedom of speech and press, nor that it deprives appellants of their property without due process of law.

The decree is modified to the extent that appellant *Gent* is made a party to this appeal, and, with such modification, said decree is affirmed.

Justice Johnson concurs. Justices George Rose Smith and Robinson dissent.

[fol. 333]

DISSENTING OPINION

SAM ROBINSON, Associate Justice:

Not only is it the duty of the United States Supreme Court to uphold the Constitution, but it is the duty of this court, and every court in the land, to support and defend the Constitution. Of course, any document as important as the Constitution has to be construed. It would be utterly impossible to write a Constitution for a great nation that would need no construction by courts of competent jurisdiction, and no one now questions the jurisdiction of the U.S. Supreme Court to construe the Constitution.

The First Amendment, as construed by the U.S. Supreme Court, among other things, protects the freedom of speech and freedom of the press. The Supreme Court has construed this Amendment many times but the majority of our court, in the case at bar, has cited only two cases on that point; neither of the cited cases sustain the majority opinion, and no other authority is cited sustaining the majority view. One of the cases cited by the majority is *Roth* v. *U.S.*, 354 U.S. 476. The facts in the Roth case are not shown, therefore it is not known whether it is analogous with the case at bar.

[fol. 334] The other case is *Jacobellis* v. *Ohio*, 378 U.S. 184. There, Jacobellis was convicted in the Ohio courts on two counts of possessing and exhibiting an alleged obscene film in violation of Ohio Statutes. The picture was a French film called "Les Amants" ("The Lovers"). The conviction was reversed by the U.S. Supreme Court. Here, the majority makes no attempt to point out any distinction between the Jacobellis case and the case at bar. Otherwise, the majority has not shown how it can be said that the material in the case at bar is obscene and therefore not protected by the First Amendment, notwithstanding what the U.S. Supreme Court has said in the Jacobellis case.

In view of the fact that undoubtedly this case will go to the U.S. Supreme Court for a final decision, I see no point in elaborating on the construction placed on the First Amendment by the majority of our court, which is contrary to the construction of the Amendment by the U.S. Supreme Court in many cases, including *Times Film Corp.* v. *City of Chicago, et al,* 355 U.S. 35; *One, Inc.* v. *Olesen, Postmaster of Los Angeles,* 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield, Postmaster General,* 355 U.S. 372; *Kingsley International Pictures Corp.* v. *Regents of the University of the State of New York,* 360 U.S. 684; *Manual Enterprises, Inc.* v. *Day, Postmaster General,* 370 U.S. 478.

All of the foregoing cases are directly in point with the case at bar. There was a conviction in each case of violating some statute prohibiting dissemination of obscene material. In each case the alleged obscenity involved was lewd, lascivious, and perhaps shocking. In each case the conviction was reversed by the Supreme Court of the United States.

[fol. 335] The majority has made no attempt whatever to distinguish the alleged obscene material in the case at bar from the material that was in issue in the foregoing cases. There is no effort to show that the material involved here is any more obscene than the material that the Supreme Court has held to be protected by the First Amendment.

In my opinion the decision in this case will be reversed by the U.S. Supreme Court. I, therefore, respectfully dissent.

I am authorized to say that Mr. Justice George Rose Smith joins in this dissent.

[fol. 336] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 337]

IN THE SUPREME COURT OF ARKANSAS

Be It Remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 5th day, being the first Monday of October, A. D. 1964, amongst others were the following proceedings, to-wit:

On the 24th day of May, A. D. 1965, a day of said term

No. 5-3529

GENT et al., Appellant,

vs.

THE STATE OF ARKANSAS, Appellee.

Appeal from Jefferson Chancery Court, First Division District.

LAW OR CHANCERY MANDATE—May 24, 1965

This cause came on to be heard upon the transcript of the record of the chancery court of Jefferson County, First Division, and was argued by solicitors; on consideration whereof it is the opinion of the Court that the decree of said chancery court in this cause should be modified to the extent that appellant Gent is made a party to this appeal, and that as so modified the decree should be affirmed.

It is, therefore, ordered and decreed by the Court that the decree of said chancery court in this cause be modified as above set out, and as so modified, in all things affirmed with costs.

It is further ordered and decreed that said appellee recover of said appellants all its costs in this Court, in this cause expended, and have execution thereof.

George Rose Smith and Robinson, JJ., dissent; Johnson, J., concurs.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 338]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

[Title omitted]

Appeal from the Jefferson County Chancery Court.

PETITION FOR REHEARING—Filed June 7, 1965

Petitioners, *Swank, Modern Man, Bachelor, Cavalcade, Gentleman, Ace,* and *Sir* magazines and their publishers, move that the Court grant a rehearing in captioned cause for the following reasons:

1. The Court erroneously based its determination of obscenity on local community standards instead of on the standards of the national community.

2. The Court used standards of obscenity not constitutionally permissible, thus denying petitioners their rights of free speech and freedom of the press and depriving them of their property without due process of law, in contravention of the First and Fourteenth Amendments to the Constitution of the United States.

3. The Court denied petitioners procedural due process in violation of the Fourteenth Amendment to the United States Constitution in refusing to consider offered evidence bearing on the establishment of community standards and in considering the testimony of witnesses on this question, when petitioners had been denied the right of proper cross-examination of these witnesses, in the Court's *de novo* determination that the magazines in suit are obscene.

[fol. 339] 4. The Injunction as issued by the trial court and approved by this Court constitutes in effect a prior restraint on publication in violation of petitioners' rights under the First and Fourteenth Amendments to the Constitution of the United States.

[File endorsement omitted]

5. The opinion of the Court leaves the erroneous impression that petitioners agreed that the Court should not consider procedural errors, when at all times, including in the oral argument, petitioners were urging that the Court consider these questions.

Wherefore, petitioners pray that they be granted a rehearing or, in the alternative, that the opinion be modified to state accurately that the Court refused to pass on the procedural errors, but not that this was done at the request of petitioners.

Robert C. Downie, Edwin E. Dunaway, Solicitors for Appellants.

Certificate

The undersigned counsel for petitioners certifies that he believes there is merit in the Petition and it is not filed for the purpose of delay. A copy has been served upon opposing counsel by mailing same on June 8, 1965.

Edwin E. Dunaway.

[fol. 340]

In the Supreme Court of Arkansas

[Title omitted]

Order Denying Rehearing—September 20, 1965

Petition for rehearing was denied in the above styled case.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 341]

State of Arkansas
In the Supreme Court.

Certificate

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition for rehearing in the case of Gent et al. v. The State of Arkansas, No. 3529, was

filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 7th day of December, 1965.
Philip N. Gowen, Clerk; By Oliver E. Cox, D.C.

[fol. 342]

IN THE SUPREME COURT OF ARKANSAS

No. 3529

[Title omitted]

PETITION OF GENT MAGAZINE FOR REHEARING AND BRIEF

Appellant, Gent Magazine-Par Publications, Inc., respectfully petitions the Supreme Court of Arkansas for rehearing upon its decision in this case in the Opinion delivered herein on May 24, 1965, upon the following grounds:

1. The Court erroneously held that the U. S. Supreme Court did not apply a national community standard in the Jacobellis v. Ohio case. The U. S. Supreme Court decision reversed the Ohio courts which had applied a *local* community standard finding the material obscene. The United States Supreme Court held that it was not obscene and the concurring opinions cannot be construed as approving a local community standard.

2. The Court rejected a national community standard but did not establish what the local community standard for Pine Bluff was under the evidence in the case and applied an unconstitutional one.

(a) Although the Opinion referred to witnesses that testified, examination of their testimony shows that virtually all of their testimony related *only* to the effect on "young people." See R. 38, 39, 40, 42, 54, 68, 74, 76, 77, 78,

85. Applying the test of the effect on young people, does not comply with the holding in the Roth case or with the requirement of the Arkansas Statute that the effect be measured by the *average person* and not just young people.

(b) The Court did not decide the question as to the admission of evidence tendered by the Appellants in the Trial Court of Pine Bluff community standards. This evidence is described at page 37 and 38 of Gent's brief and R. 153 through 159. This evidence should have been admitted and its effect on the community standard considered with the other evidence in the Record.

(c) The Court should have taken into account the effect [fol. 343] of the Trial Court's erroneous limitation of defense's cross examination of witnesses to test the community standard by the witnesses against other materials available in the community (See R. 44, 45, 48, 49, 50 & 51). Since such cross examination was not permitted in the Trial Court, the Arkansas Supreme Court should evaluate the State's witnesses' testimony in the light of the other materials tendered by the defense or disregard their testimony.

3. The Court's Opinion misleadingly states that the Appellant requested that legal mistakes in the Trial Court be disregarded. The Appellant, Gent Magazine, was agreeable to have the case decided on the merits rather than remanded but not that the errors be disregarded. Failure to consider the errors resulted in a denial of due process of law.

4. Footnote 6 of the Opinion states that no effort was made to point out the differences in the various magazines. Gent Magazine argued separately from the other magazines that its contents were not obscene either by the dominant theme of the material or individual articles and discussed them in detail (See Gent's brief, pages 34-37). We submit that Gent Magazine should be separately evaluated.

Wherefore, the Appellant, Gent Magazine-Par Publications, Inc., pray for rehearing of this cause and that the

Court separately evaluate this Appellant's magazine on its own merits, and to find that said issue of the Appellant's magazine is not obscene and reverse and dismiss the case.

Gregory & Claycomb, by H. Murray Claycomb.

CERTIFICATE

Attorneys for Appellant Gent Magazine-Par Publications, Inc., Petitioner for rehearing, certify that they believe there is merit in the foregoing Petition for Rehearing and in the argument thereon, presented herewith, and said Petition is not filed for the purpose of delay.

Gregory & Claycomb, by H. Murray Claycomb,
Attorneys for Gent Magazine.

[fol. 344] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 345]

IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
September 20, 1965

Petition for rehearing was denied today in the following case.

3529. Gent v. State of Ark.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 346]

STATE OF ARKANSAS

IN THE SUPREME COURT

CERTIFICATE

I, Philip N. Gowen, Clerk for the Supreme Court of Arkansas, certify that the petition of the appellants, Gent

and Par Publications, Inc., for rehearing in the case of Gent, et al. v. The State of Arkansas, No. 3529, was filed timely and that it was considered and decided on its merits. Said petition having been denied on September 20, 1965.

Witness my hand and seal this 13th day of December, 1965.

Philip N. Gowen, Clerk.

[fol. 347]

IN THE SUPREME COURT OF THE STATE OF ARKANSAS

No. 3529

GENT, SWANK, BACHELOR, CAVALCADE, GENTLEMAN, ACE and SIR (MAGAZINES), and PAR PUBLICATIONS, INC., ROYAL PUBLICATIONS, INC., MAGTAB PUBLISHING CORP., SKYE PUBLISHING CO. INC., BRUCE-ROYAL PUBLISHING CO., FOUR STAR PUBLICATIONS, INC. and VOLITANT PUBLISHING CORP., Appellants,

—against—

THE STATE OF ARKANSAS, Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—December 6, 1965

Sir:

I. Notice is hereby given that the above-named Gent, Swank, Bachelor, Cavalcade, Gentleman, Ace and Sir (Magazines), and Par Publications, Inc., Royal Publications, Inc., Magtab Publishing Corp., Skye Publishing Co. Inc., Bruce-Royal Publishing Co., Four Star Publications, Inc. and Volitant Publishing Corp., hereby appeal to The Supreme Court of the United States from the final judgment of the Supreme Court of the State of Arkansas dated May 24, 1965 and from its orders, each dated and entered on Sep-

tember 20, 1965 denying the applications of the appellants for a rehearing of same. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The clerk of this court will please prepare a transcript of the record of this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

[fol. 348] 1. This Notice of Appeal and proof of service thereof;

2. The judgment of the Supreme Court of Arkansas;

3. The appellants' petitions for a rehearing and the orders denying same;

4. Abstract and Brief for Appellants, and Supplemental Abstract and Brief for Appellant Gent Magazine Par Publications, Inc. filed in the appeals to the Supreme Court of Arkansas by the appellants;

5. The exhibits in evidence.

III. The following questions are presented by this appeal:

1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden prior restraint on expression?

2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?

3. Was the statute in question applied unconstitutionally in violation of the First and Fourteenth Amendments by providing a restraint upon the publication and distribution of future issues of the magazines?

4. Was Act 261 of The Arkansas Acts of 1961 unconstitutionally applied in this case in reaching the conclusion that the publications are obscene?

5. Are the publications in question obscene within the construction of the Fourteenth Amendment?

[fol. 349] 6. Was the Fourteenth Amendment violated by the appellee's failure to prove by scientific and competent evidence that the publications appeal to prurient interests as construed?

7. Was the Fourteenth Amendment violated by the failure of the Supreme Court of Arkansas to consider each magazine as a whole in determining that they are obscene?

8. Was the Fourteenth Amendment violated by the failure and refusal of the Supreme Court of Arkansas to refuse to accept evidence of community standards and to apply a national standard in adjudicating said publications as obscene?

9. Were the First and Fourteenth Amendments violated by the direction in the decree for the destruction of all copies of the issues of the magazine complained against possessed by appellants, whether such possession was in Jefferson County, Arkansas or in some other States of the United States?

10. Were the First and Fourteenth Amendments violated by the provisions of the decree restraining the possession of future issues of the magazines involved?

Dated: December 6, 1965.

Emanuel Redfield, Esq., Attorney for Appellants, Office & P. O. Address, 60 Wall Street, New York 5, New York, HAnover 2-1023.

[fol. 350] Certificate of Service (omitted in printing).

[fol. 351] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 352]

SUPREME COURT OF THE UNITED STATES

No. 874—October Term, 1965

GENT et al., Appellants,

v.

ARKANSAS.

Appeal from the Supreme Court of Arkansas.

ORDER NOTING PROBABLE JURISDICTION—May 16, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted limited to Questions 1 and 2 presented by the jurisdictional statement which read as follows:

"1. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it operates as a forbidden restraint on expression?

"2. Is Act 261 of The Arkansas Acts of 1961 invalid in that on its face and as applied it impairs the freedom of expression protected by the First and Fourteenth Amendments to the Constitution of the United States, in that it is vague and uncertain?"

The case is placed on the summary calendar. As to the other questions presented, which are nonappealable, treating the papers as a petition for writ of certiorari, certiorari is denied. Mishkin v. New York, 383 U.S. 502, at 512-514.

Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Stewart would note probable jurisdiction without limitation.